Centre for International Governance Innovation

British Institute of International and Comparative Law

Brexit: The International Legal Implications | Paper No. 3 – November 2017

UK Patent Law and Copyright Law after Brexit

Potential Consequences

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About the Series

Brexit: The International Legal Implications is a series examining the political, economic, social and legal storm that was unleashed by the United Kingdom's June 2016 referendum and the government's response to it. After decades of strengthening European integration and independence, the giving of notice under article 50 of the Treaty of the European Union forces the UK government and the European Union to address the complex challenge of unravelling the many threads that bind them, and to chart a new course of separation and autonomy. A consequence of European integration is that aspects of UK foreign affairs have become largely the purview of Brussels, but Brexit necessitates a deep understanding of its international law implications on both sides of the English Channel, in order to chart the stormy seas of negotiating and advancing beyond separation. The paper series features international law practitioners and academics from the United Kingdom, Canada, the United States and Europe, explaining the challenges that need to be addressed in the diverse fields of trade, financial services, insolvency, intellectual property, environment and human rights.

The project leaders are Oonagh E. Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); and Eva Lein, a professor at the University of Lausanne and senior research fellow at the British Institute of International and Comparative Law (BIICL). The series will be published as a book entitled *Complexity's Embrace: The International Law Implications of Brexit* in spring 2018.

About the Author

Luke McDonagh is a senior lecturer at the Law School at City, University of London. He has published widely on the subject of intellectual property in journals such as the *Modern Law Review, Journal of Law & Society* and *Intellectual Property Quarterly.* His first monograph, *European Patent Litigation in the Shadow of the Unified Patent Court*, was published in 2016 by Edward Elgar. He previously held the position of lecturer in law at Cardiff University (2013–2015) and LSE Fellow at the London School of Economics (2011–2013). He has been a visiting lecturer at Keio University (2017) and a visiting scholar at Waseda University (2015 and 2017).

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Acronyms and Abbreviations

EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Agreement
EPs	European patents
EPC	European Patent Convention
EPO	European Patent Office
FTA	free trade agreement
IP	intellectual property
SPCs	supplementary protection certificates
TFEU	Treaty on the Functioning of the European Union
UP	unitary patent
UPC	Unified Patent Court

Executive Summary

This paper examines the areas of patent law and copyright law in the context of Britain's exit from the European Union, or "Brexit." Although neither area of intellectual property (IP) is fully harmonized, the United Kingdom's exit from the European Union could nonetheless have a sizable impact on both sets of rights. For patents, Brexit could lead the United Kingdom to diverge from EU principles on biotechnology and supplementary protection certificates, and also puts the United Kingdom's role in the new Unified Patent Court (UPC) system into doubt. In the area of copyright, the United Kingdom could use Brexit as an opportunity to move away from EU standards, including the key definitions of originality and parody. Ultimately, however, this paper argues that the slogan "take back control" is unlikely to lead to dramatic changes in the IP field. Both the European Union and the United Kingdom will likely seek to retain a great deal of regulatory convergence and cooperation over IP.

Introduction

This paper grapples with the slogan "take back control" — the signature claim of the pro-Brexit campaign that Britain's exit from the European Union, or "Brexit," would ensure the United Kingdom would take control of its own laws. Although IP concerns were not front and centre during the referendum campaign, the idea of taking back control undoubtedly has resonance in the IP field.[1] This is the case, even though, unlike the areas of trademarks and designs explored by Marc Mimler's paper in this series, neither patent law nor copyright law is fully "Europeanized." In fact, despite the lack of overarching harmonizing legislation, EU law has had a substantial effect on the protection of patented inventions and works of copyright in the United Kingdom.[2]

At the same time, it is important to recall that the UK legal system's protection of patents and copyrights predates the European Union. Even today, although compliant with EU law, UK patent and copyright laws are largely rooted in domestic legislation[3] and non-EU international agreements, such as the Berne Convention and the European Patent Convention.[4] Yet, the impact of EU law on IP means that Brexit will undoubtedly have a major impact on the United Kingdom's current legal framework and could, at least in theory, provide the opportunity for the United Kingdom to take back control.[5]

A so-called hard Brexit would sever all links with the EU *acquis*, including ending the European Court of Justice's (ECJ's) jurisdiction in the United Kingdom. Nevertheless, the malleability of the common law system means that, post-Brexit, UK courts can continue to apply EU-derived principles within patent law and copyright law until new UK legislation provides otherwise. Moreover, UK courts will likely find ECJ judgments persuasive in cases involving EU law-derived definitions and terms.[6] By contrast, a soft Brexit, i.e., where the United Kingdom stays within the European Free Trade Agreement (EFTA) or the European Economic Area (EEA), would mean that many IP directives would remain valid.

Further to this, the guarantees of IP protection under the EU Charter on Fundamental Rights will

1 Andreas Rahmatian, "Brief speculations about changes to IP law in the UK after Brexit" (2017) 12:6 J Intell Prop L & Pr 510; Trevor Cook, "'Brexit' and Intellectual Property Protection in the UK and the EU" (2016) 21:5–6 J Intell Prop Rts 355.

2 Marc Mimler, "The Effect of Brexit on Trademarks, Designs and Other 'Europeanized' Areas of Intellectual Property Law in the United Kingdom" in Oonagh E Fitzgerald & Eva Lein, eds, *Complexity's Embrace: The International Law Implications of Brexit* (Waterloo, ON: CIGI, 2018). See also Justine Pila, "Intellectual Property as a Case Study in Europeanization: Methodological Themes and Context" in Ansgar Ohly & Justine Pila, eds, *The Europeanization of Intellectual Property Law* (Oxford, UK: Oxford University Press, 2013) 3.

3 *Patents Act 1977* (UK), c 37; *Copyright, Designs and Patents Act 1988* (UK), c 48.

4 *Berne Convention for the Protection of Literary and Artistic Works,* 9 September 1886 (amended 28 September 1979), online: <www.wipo.int/treaties/en/text.jsp?file_id=283698>; *European Patent Convention,* 5 October 1973 (amended 14 October 2015), online: <www.epo.org/law-practice/legal-texts/html/epc/2016/e/index.html> [*EPC*].

5 Benjamin Farrand, "Bold and newly Independent, or Isolated and Cast Adrift? The Implications of Brexit for Intellectual Property Law and Policy" (2017) 7:2 J Common Market Stud 1.

6 This may occur in a similar way to the current practice of UK courts with respect to EPO Board of Appeals decisions; see e.g. *Conor v Angiotech* [2008] UKHL 49; *Human Genome Sciences v Eli Lilly* [2011] UKSC 51.

not disappear entirely in the United Kingdom: post-Brexit, the United Kingdom will remain a member of the Council of Europe, and thus, will be subject to the European Convention on Human Rights (ECHR), which applies to UK courts under the Human Rights Act 1998.[7] The ECHR, like the EU Charter of Fundamental Rights, protects intellectual property, including patents and copyright, and the rulings of the two courts — the European Court of Human Rights and the ECJ — have always converged in the interpretation of these rights.[8]

At this delicate stage of the Brexit process, with negotiations ongoing at the time of writing, it is impossible to establish a definitive picture of what the law will look like in the years to come. However, it is possible to explain how EU law is integrated into the UK law of patents and copyright — the status quo — and to consider the possible directions the law may travel in the years to come. This paper first examines how IP came to be integrated within the EU legal order, and then goes on to examine the specific cases of patent law and copyright law. Finally, the paper concludes by arguing that due to "the web of the international, regional and bilateral obligations that exist in the field of IP," "the benefits that this harmonization brings to the creative environment," and the "integration of markets that has occurred in part through the 60 years of the EU," the United Kingdom will likely take back control much less than the "Brexiteers" have imagined.[9]

EU Intellectual Property Law: A History of Ever-growing Integration

When the Treaty of Rome established the European Economic Community (EEC) in 1957, it did not grant the competence to legislate for IP.[10] The treaty rather stated in article 222 that EEC law would not "prejudice the system existing in Member States in respect of property."[11] For this reason, in the decades that immediately followed, IP legislative harmonization efforts took place at the international multilateral level.[12] One such measure was the 1975 Community Patent Convention, developed as a special agreement between member states of the then EEC.[13]

Nonetheless, over the past 50 years, as the EEC has transformed, first into the European Community (EC) and later the European Union, the ECJ has increasingly perceived that national rules for IP protection — and the variances therein — are capable of creating obstacles to the successful operation of key principles of the treaties.[14] Quite early on, from the 1960s onward, the ECJ began to scrutinize IP under the treaty rules — importantly, the court began to distinguish between the existence of IP rights, which were governed by national law, and their exercise, in particular as IP-relevant goods and services crossed borders within the European Union.[15] The ECJ perceived that the rules of the internal market required that the exercise of

7 *Human Rights Act 1998* (UK), c 42.

8 Jonathan Griffiths & Luke McDonagh, "Fundamental Rights and European Intellectual Property Law: The Case of Art 17(2) of the EU Charter" in Christoph Geiger, ed, *Constructing European IP: Achievements and New Perspectives* (Cheltenham, UK: Edward Elgar, 2013) 75–93.

9 Graeme B Dinwoodie & Rochelle C Dreyfuss, "Brexit and IP: The Great Unraveling?" (2017) NYU School of Law Public Law & Legal Theory Research Paper Series Working Paper 17–26.

10 *Treaty Establishing the European Economic Community*, 25 March 1957, OJ, C 224 art 100 (entered into force 1 January 1958) [*Treaty of Rome*].

11 Additionally, article 36 states that the protection of industrial and commercial property could be regarded as exceptions for the prohibition of restrictions to the freedom of movement of goods.

12 Guy Tritton, *Tritton on Intellectual Property in Europe*, 4th ed (London, UK: Sweet & Maxwell, 2014) at 1–21.

13 While the convention did not come into force, its provisions were used as templates for national patent laws (see e.g. *Patents Act 1977* [UK], c 37, s 130 [7]); "Resolution on the Adjustment of National Patent Law Records of the Luxembourg Conference on the Community patent 1975", *Records of the Luxembourg Conference on the Community patent 1975* (Luxembourg: Office for Official Publications of the European Communities, 1982) 332, online: <http://aei.pitt.edu/10329/1/10329.pdf>.

14 *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm*, 29 February 1968, Case No 24/67, ECLI:EU:C:1968:11, 55, 71 [*Parke, Davis and Co.*], online: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61967CJ0024>.

15 Tritton, *supra* note 12.

IP rights should fall under the shared scrutiny of both the member states and the European Union.[16] Initially, this concerned the impact of national IP rules on EU competition.[17] Soon, however, the focus shifted to the potentially adverse effects of IP rights on the free movement of goods.[18]

Eventually, the European Union realized that it would be more efficient to resolve some of the discrepancies between treaty principles and national IP rights via harmonization. The European Commission did this primarily by enacting directives based on article 114(1) of the Treaty on the Functioning of the European Union (TFEU) and its predecessor,[19] concerning the establishment and functioning of the internal market.[20] In addition to harmonization via directives, unitary EU-wide IP rights have been enacted through regulations.[21] Such measures were initially based on article 352 of the TFEU,[22] however, the Treaty of Lisbon introduced article 118, which specifically provides for the introduction of EU-wide IP rights.[23] As this paper shows, directives and regulations have had a substantial impact on the law of both patents and copyright.

Patents

The EU statute book reveals that there is much less EU legislation in this field than in the other IP areas. As a result, in theory, patent law will be the IP area "where the UK will formally re-acquire the least sovereignty" post-Brexit.[24]

In fact, the key treaty on patenting in Europe — the European Patent Convention (EPC) of 1973 — was agreed outside the European Union and has a wider membership, including Iceland, Switzerland and Turkey, for example, as well as several other non-EU territories.[25] Via the EPC system, European patents (EPs) may be filed, prosecuted and administered at the European Patent Office (EPO), which has its main office in Munich, Germany. Yet, the EPO's "European patent" is actually a bundle of national patent rights that must be validated in the national territory. As such, UK EPs will continue to exist post-Brexit.[26]

Even though the primary governing law, the EPC, exists outside the European Union's authority, the European Union has, in fact, legislated in several areas relating to patents. The following pieces of EU legislation have a direct impact: Directive 98/44/EC (biotechnological inventions);[27] Regulation 2100/94 (plant variety rights);[28] Directive 2004/48/EC (enforcement directive);[29] Regulation 469/2009/EC (SPCs for medicinal products);[30] Directive 2001/82/EC (veterinary medicinal products);[31] Directive 2001/83/EC (medical products for human use);[32] Directive 2009/24/EC (computer

16 Pila, *supra* note 2 at 10.

17 Peter Groves et al, *Intellectual Property and the Internal Market of the European Community* (London, UK: Graham & Trotman: 1993) at 5; see e.g. *Consten and Grundig v Commission of the EEC,* 13 July 1966, Case No 56/64, ECLI:EU:C:1966:41, online: <http://curia.europa.eu/juris/liste.jsf?num=C-56/64&language=en>; *Parke, Davis and Co., supra* note 13.

18 Tritton, *supra* note 12.

19 *Treaty on the Functioning of the European Union,* 13 December 2007, OJ, C 326/01 [*TFEU*]; *Treaty Establishing the European Community,* 25 March 1957, OJ, C 325 art 95 (entered into force 1 January 1958) [EC].

20 *Federal Republic of Germany v European Parliament and Council of the European Union,* C-376/98, [2000] ECLI:EU:C:2000:544 at paras 83–84.

21 Trevor Cook, *EU Intellectual Property Law* (Oxford, UK: Oxford University Press, 2010) at 4–5.

22 EC, *supra* note 19, art 308; *TFEU*, *supra* note 19, art 235.

23 *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 13 December 2007, OJ, C 306 (entered into force 1 December 2009), online: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12007L/TXT>.

24 Dinwoodie & Dreyfuss, *supra* note 9 at 8–10.

25 *EPC*, *supra* note 4.

26 Luke McDonagh, *European Patent Litigation in the Shadow of the Unified Patent Court* (Cheltenham, UK: Edward Elgar, 2016) at 1–10.

27 EC, *Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions*, [1998] OJ, L 213/13.

28 EC, *Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights*, [1994] OJ, L 227. See also EC, *Council Regulation (EC) No 873/2004 of 29 April 2004 amending Regulation (EC) No 2100/94 on Community plant variety rights*, [2004] OJ, L 162.

29 EC, *Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights*, [2004] OJ, L 195/22. A relevant UK case on the enforcement directive is *HTC Corporation v Nokia Corporation,* [2013] EWHC 3778 (Pat).

30 EC, *Regulation 469/2009/EC of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products*, [2009] OJ, L 152.

31 EC, *Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products*, [2001] OJ, L 311.

32 EC, *Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use*, [2001] OJ, L 311 [*Directive 2001/83/EC*].

programs);[33] Regulation 1257/2012 (unitary patent [UP] regulation);[34] and Regulation 1260/2012 (UP translation arrangements).[35] In addition, there is a regulation on IP border enforcement.[36]

For present purposes, the most significant pieces of EU legislation are the biotechnology directive (which governs the limits to biotechnological inventions), the supplementary protection certificates (SPCs) regulation (which allows an extension of up to five years' protection for patented medicines),[37] and the regulation establishing the UP. Keeping this in mind, this paper will focus on the two most important elements of the relationship between patents and the European Union: ECJ jurisprudence, in particular in the areas of biotechnology and SPCs; and the implementation of the recent EU-led patent reforms, i.e., the UPC and the European Patent with Unitary Effect, including the UP regulation.

ECJ Case Law

It is beyond the scope of this paper to give an authoritative overview of ECJ jurisprudence on patent case law — there is simply too much ground to cover. Rather, this paper outlines two cases in the most significant areas of EU patent law — biotechnology and SPCs — in order to show the importance of EU law in the patent area.

The Biotechnology Directive

The biotechnology directive sets the terms for patenting inventions in the area of biotechnology. One of the most significant elements of the directive is that it restricts patentability for any invention that involves "uses of human embryos for industrial or commercial purposes." Yet, the directive does not provide a definition of what constitutes a "human embryo." It was therefore left to the ECJ in the 2011 ***Brüstle*** case to explain the meaning of a human embryo in this context.[38] The ECJ decided that article 6(2)(c) of the biotechnology directive must be interpreted as meaning the following: "The use of human embryos for scientific research purposes is not patentable. A 'human embryo' within the meaning of Union law is any human ovum after fertilisation or any human ovum not fertilised but which, through the effect of the technique used to obtain it, is capable of commencing the process of development of a human being."

The ECJ then referred the case back to the referring German court to decide the factual matter, giving account to available scientific evidence as to whether a stem cell obtained at the blastocyst stage from a human embryo falls within the definition of "human embryo."[39]

The ECJ's decision in *Brüstle* was hotly debated, with some considering the court to be an inappropriate place to determine questions of morality, while others wondering whether the European Union would be left at a competitive disadvantage with the United States, which does allow patenting under the *Brüstle* circumstances.[40] Either way, the impact of the ECJ's authority in this important area of patenting is undeniable. Further to this, even post-Brexit, the biotechnology directive will continue to carry influence on UK patent law via the United Kingdom's EPC

33 EC, *Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs*, [2009] OJ, L 111.

34 *Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection*, [2012] OJ, L 361/1 [*UP Regulation*].

35 *Council regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements* [2012] OJ, L 361/89 [*Translation Regulation*].

36 *Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003*, [2013] OJ, L 181.

37 EC, *Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions*, [1998] OJ, L 213/13.

38 *Brüstle v Greenpeace* (2011) C-34/10, ECLI:EU:C:2011:669.

39 Although the German Federal Court allowed the patent to continue as valid in amended form, the EPO later revoked the corresponding European patent. See European Patent Office, "EPO revokes patent in the 'Brüstle' case", (11 April 2013), online: <www.epo.org/news-issues/news/2013/20130411a.html>.

40 Alain Pottage & Claire Marris, "The cut that makes a part" (2012) 7:2 BioSocieties 103–14.

membership, since the EPO pays regard to the directive and its interpretation by EU institutions.[41]

SPCs for Medicinal Products

A patentee can apply for an SPC to extend the life of a medicinal or pharmaceutical patent — beyond the usual 20 years — if there was a delay in the European Medicines Agency granting the marketing authorization allowing the patented medicine to be sold within the European Union's internal market.[42] Although the SPC regulation is a relatively short and seemingly unassuming piece of legislation, it has led to a great deal of ECJ case law.[43]

One significant example is the *Arne Forsgren* case.[44] Here, the ECJ analyzed the limits of SPC protection. The facts of the case were as follows: Protein D subsists in a vaccine called Synflorix, which has an important and lucrative pediatric use. Within Synflorix, Protein D acts as a "carrier protein" — one conjugated by covalent bonds. Yet, the actual application for an SPC referred to Protein D per se — not in the conjugated form.

The relevant Austrian authority, therefore, rejected the SPC application, stating that Protein D only subsists in Synflorix as a conjugate of other "active" ingredients and that Protein D is a mere excipient. Thus, in *Arne Forsgren* the ECJ was asked to analyze the following two questions: first, can an SPC be obtained with respect to a product per se in "separate" form, in a scenario involving a marketing authorization for a medicine in which the product is covalently bonded to other ingredients? Second, can the SPC rely on a marketing authorization that merely describes the product as a "carrier protein" and does not provide any information about an independent therapeutic effect?

In its 2015 decision, the ECJ answered the first question by stating that the "covalent bonding" issue should not prevent the granting of an SPC. In relation to the second question — whether the marketing authorization was sufficient to support the SPC — the ECJ held that for Protein D to be an "active ingredient" as required by the regulation, it needed to produce "a pharmacological, immunological or metabolic action of its own which is covered by the therapeutic indications of the marketing authorisation." Ultimately, the ECJ left that factual determination to the referring national authority. Yet, the ECJ's clear guidance is illustrative of its crucial role as the final arbiter of an important patent-related question: should an SPC be granted to extend the life of a particular patented medicine?

The Unified Patent Court

As noted earlier, the granting of EPs takes place at the EPO. However, patent litigation in Europe concerning, for example, infringement of EPs takes place at the national level.[45] It is national courts that deal with questions of patent infringement within their national territories. National courts can also consider issues of patent validity — although the EPO remains the final arbiter on patent validity via its opposition system.[46] Due to this overlap, national patent litigation and EPO opposition proceedings on the validity of the same patent can occur in parallel; furthermore, national courts are often quicker to decide questions of validity than the EPO Board of Appeals.[47] This can cause difficulties if the EPO rules that a patent is valid, when it has already been invalidated in a national territory. In addition, national courts in the United Kingdom and Germany, for example, can make divergent decisions on infringement (and validity), which can cause fragmented

41 See European Patent Office, "EPO stays proceedings in certain biotechnology cases", (12 December 2016), online: <www.epo.org/news-issues/news/2016/20161212.html>; European Patent Office, "EPO clarifies practice in the area of plant and animal patents", (29 June 2017), online: <www.epo.org/news-issues/news/2017/20170629.html> (both EU provisions were issued in light of a Notice of the European Commission related to articles in the EU biotechnology directive).

42 Manthan Janodia, "Comparative Quantitative Analysis of Supplementary Protection Certificates (SPCs) in Europe" (2017) 22 J Intell Prop Rts 16 at 18–22.

43 David Brophy, "Another SPC referral: will we get clarity or more questions?", *The IPKat* (22 October 2012), online: <http://ipkitten.blogspot.co.uk/2012/10/another-spc-referral-will-we-get.html>.

44 *Arne Forsgren v Österreichisches Patentamt* (2015) C-631/13, ECLI:EU:C:2015:13.

45 *EPC*, *supra* note 4. Even though, at present, a patentee can apply to the EPO for an EP with a single application in one of the three official EPO languages, once granted, a patent must be filed and translated into the other two official EPO languages. See also the *Agreement on the application of Article 65 of the Convention on the Grant of European Patents*, 17 October 2000, OJ EPO 549 (2001), online: <http://documents.epo.org/projects/babylon/eponet.nsf/0/7FD20618D28E9FBFC125743900678657/$File/London_Agreement.pdf>.

46 See generally EPO, *Patent Litigation in Europe: An overview of national law and practice in the EPC contracting states* (2016), online: <www.epo.org/learning-events/materials/litigation.html>.

47 McDonagh, *supra* note 26 at 1–16.

patenting across EU member states, impacting on competition within the internal market.[48]

With these problems in mind,[49] in February 2013, the United Kingdom and 24 other countries signed an intergovernmental agreement to create a UPC.[50] Effectively, the complete package establishes unitary patent protection and enforcement within the vast majority of the EU member states.[51] Total unification is not yet possible — Croatia, Poland and Spain are not yet participants in the new system, although they may join at a later date. London is due to host one of the UPC's central divisions.[52]

Alongside the UPC Agreement, EU regulations were enacted to establish the European patent with unitary effect and the relevant UP translation arrangements.[53] The EU regulations were passed into law via the system of enhanced cooperation introduced by the Lisbon Treaty.[54] The UP is enabled by the EPC, which contains an option to allow validation of patents on a supranational basis.[55] In fact, the UP application and grant process will be the same as for the regular EPs. Thereafter, once the EPO grants the patent, the patentee will have the option to choose either the traditional EP or the new UP, which gives unitary protection across 25 EU member states.[56] Finally, the UPC will not only have exclusive jurisdiction to hear disputes concerning the validity and infringement of the new UPs, but also existing and prospective EPs (subject to the transition period, when jurisdiction over EPs will be shared with national courts, unless, during this period, EPs are opted out of the UPC in order to remain solely within the national system).[57]

The UPC and the UP Post-Brexit: Can the UK Still Participate?

Although the two EU regulations are technically already in force,[58] they will only apply once the UPC Agreement is ratified by Germany, France and the United Kingdom, as well as 10 more participating signatory states. As of September 2017, this ratification has yet to take place. Key to the delay has been Brexit (although that is not the only current stumbling block, as a recent German constitutional challenge demonstrates).[59]

The ECJ in Opinion 1/09 held that only states that accept the supremacy of EU law and the jurisdiction of the ECJ may sign up.[60] The reason this is important is that even though the UPC will have its own jurisdiction to rule with respect to most patent issues — such as patent infringement and validity — it must follow ECJ rulings in EU law matters, such as biotechnology, enforcement or SPCs. In this vein, article 21 of the UPC Agreement allows the UPC to refer EU law questions to the ECJ.[61] Therefore, the ECJ will have an impact on the law applied by the UPC, although not, apparently, on core patent-specific matters — a situation that is intended to differentiate the patents area from the field of trademarks, where the ECJ has developed, and expanded upon, core EU legislation on trademarks, often to the chagrin of trademark experts.[62]

48 *Ibid.*

49 EPO Economic and Scientific Advisory Board, *Recommendations for improving the patent system* (Munich, Germany: EPO, 2012) at 1–5, online: <http://documents.epo.org/projects/babylon/eponot.nsf/0/835DA6DA218CB760C1257B2C004E809E/$FILE/ESAB_statement_en.pdf>.

50 *Agreement on a Unified Patent Court*, C 175/1 [*UPC Agreement*], online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:175:0001:0040:EN:PDF>.

51 *UP Regulation*, *supra* note 34; *Translation Regulation*, *supra* note 35. For a further explanation of the changes, see the EPO website: <www.epo.org/law-practice/unitary.html>.

52 McDonagh, *supra* note 26 at 1–16. See also Luke McDonagh, *Exploring perspectives of the Unified Patent Court and the Unitary Patent within the Business and Legal Communities* (Newport, UK: Intellectual Property Office, 2014), online: <www.gov.uk/government/publications/exploring-perspectives-of-the-up-and-upc>.

53 *UP Regulation*, *supra* note 34; *Translation Regulation*, *supra* note 35.

54 *Treaty of Lisbon*, *supra* note 23.

55 *EPC*, *supra* note 4, arts 2, 142.

56 Reto Hilty, "The Unitary Patent Package: Twelve Reasons for Concern" (2012) Max Planck Institute for Intellectual Property & Competition Law Research Paper No 12-12.

57 Trevor Cook, "The Progress to date on the Unitary European Patent and the Unified Patent Court for Europe" (2013) 18 J Intell Prop Rts 584, 586.

58 *UP Regulation*, *supra* note 34, art 18(2); *Translation Regulation*, *supra* note 35, art 7(2).

59 Edward Nodder, "Further details on the German constitutional challenge to UPC legislation", Bristows UPS (17 August 2017), online: <www.bristowsupc.com/latest-news/further_details_on_german_constitutional_challenge_upc_legislation/>.

60 ECJ, *Opinion 1/09 of 8 March 2011*, para 82, online: <http://ec.europa.eu/dgs/legal_service/arrets/09a001_en.pdf>.

61 See also *UPC Agreement*, *supra* note 50, art 1(2); *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, C 326/01 (2012) art 267, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2012:326:TOC>.

62 See Jonathan Griffiths, "Constitutionalising or harmonising? The Court of Justice, the Right to Property and European Copyright Law" (2013) 38 Eur L Rev 65; Luke McDonagh, "From Brand Performance to Consumer Performativity: Assessing European Trade Mark Law after the Rise of Anthropological Marketing" (2015) 42 JL & Soc'y 611–36.

The ECJ's role makes the UPC an awkward court for the Brexit-focused United Kingdom to sign up to. Prime Minister Theresa May is on record as saying that the United Kingdom would, post-Brexit, end the jurisdiction of the ECJ, something repeated in the government's Brexit white paper.[63] If the UK government is determined to "escape" the ECJ's jurisdiction, then how can the United Kingdom participate in the UPC, which requires accepting the supremacy of patent-related EU law and ECJ jurisdiction on such questions? The answer is unclear. Yet, in November 2016, the UK government announced that it would ratify the UPC Agreement, despite the Brexit referendum result, since the UPC is "an international court," not an EU one. This continues to be the official policy at the time of writing.[64]

An optimistic view of the UK government's position on the UPC would be that, per the Brexit white paper (2.7–2.10), it accepts that the creation of new dispute resolution panels or tribunals will be a necessary element of any free trade agreement (FTA) between the United Kingdom and the European Union post-Brexit. It may even indicate that the United Kingdom would accept the authority of an "international court," such as the UPC, where it has the limited capacity to determine specific commercial law questions, i.e., patent matters that are common to the United Kingdom and its "new partnership with the European Union." A more pessimistic view would note that the United Kingdom's position is not the only factor: even if the UPC Agreement can be amended to allow the United Kingdom to participate as a non-EU member, it is uncertain whether the ECJ would be willing to accept this as valid.[65] Unless the United Kingdom demonstrates a sincere willingness to be bound by all the elements of EU law in this area, the prospect of UK UPC membership will remain a remote one.

At present, with the further delay caused by the German constitutional challenge, it is looking increasingly unlikely that UPC ratification will occur before Brexit takes place in March 2019. On the face of it, the seemingly endless delays, coupled with the awkwardness of the United Kingdom's position on the UPC/ECJ, puts continuing UK participation in serious doubt. This is not just a problem for UK legal services; it could have profound overall consequences for the United Kingdom's involvement in European patenting. Although the United Kingdom will remain an EPC member no matter what, unless it participates in the UPC system, the United Kingdom and UK judges will miss out on defining the future requirements of European patenting, since the UPC's decisions are likely to influence the jurisprudence of the EPC and its administrative appeals system.

If UK UPC participation is complicated, but legally possible, the UP is a different story. Created by an EU regulation, the UP is clearly an "EU IP right" — it cannot be considered a predominantly "international right." Further to this, the United Kingdom has not, as yet, given any indication of whether it would be willing to seek any accommodation with the European Union about how the UP might remain valid in the United Kingdom post-Brexit. Thus, even with so much uncertainty, it seems much more likely that the United Kingdom could remain part of the UPC system than the UP. If this strange situation were to occur, from the United Kingdom's perspective, only EPs valid in the United Kingdom could be litigated at the UPC, since the UP would apply only in the other 24 UPC signatory states.[66]

63 HM Government, *The United Kingdom's exit from and new partnership with the European Union* (London, UK: Williams Lea Group, 2017), online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/588948/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf>.

64 Katharine Stephens, Christopher de Mauny & Will Smith, "UK Government appoints new IP Minister, Jo Johnson MP, who provides an update on the UPC", *Bird & Bird* (12 January 2017), online: <www.twobirds.com/en/news/articles/2017/uk/uk-government-appoints-new-ip-minister>.

65 Dinwoodie & Dreyfuss, *supra* note 9 at 19.

66 *Ibid* at 6–8.

Copyright

There is no overarching unitary regulatory system for EU copyright. Despite this, key elements of substantive copyright law have been harmonized in the European Union. This has occurred via 10 EU directives that have been implemented in the United Kingdom: the Information Society (InfoSoc) Directive;[67] the Rental and Lending Directive;[68] the Artist's Resale Right Directive;[69] the Satellite and Cable Directive;[70] the Software Directive;[71] the Enforcement Directive (also relevant to patents, as noted earlier);[72] the Database Directive;[73] the Term Directive;[74] the Orphan Works Directive;[75] and the Collective Management of Copyright and Related Rights Directive.[76]

These directives have proven central to the adjudication of copyright law in Europe. In fact, in comparison with trademarks and designs, the harmonization of copyright law in the European Union has, to a great extent, been "the result of judicial interpretation by the Court of Justice, rather than comprehensive legislative intervention."[77] This body of ECJ case law will, post-Brexit, in principle, cease to be binding on the United Kingdom (unless there is a transitional or longer-term agreement between the United Kingdom and the European Union that provides for the compulsory jurisdiction of the ECJ on copyright).

There is insufficient space here to consider all the areas of copyright involving EU law and ECJ jurisprudence — instead, this paper focuses on perhaps the three most important areas: originality, exceptions to copyright protection and *sui generis* rights.

Originality

In the 2009 case of *Infopaq International A/S v Danske Dagblades Forening*,[78] the ECJ had the task of determining the scope of originality in the context of copyright infringement under the Information Society Directive in a case involving an online news aggregation service.[79] Crucially, the ECJ held that "intellectual creation" is the standard of originality that applies to all copyright works within the European Union. The ECJ considered that it is "only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation."[80] This decision came as a surprise because the EU originality threshold of intellectual creation did not exist as a broad, wide-ranging standard in EU legislation;[81] it was merely the threshold for databases, photographs and computer programs, as stated in the relevant directives.[82] Nonetheless, the

67 EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, [2001] OJ, L 167/10 [*Directive 2001/29/EC*] .

68 EC, *Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property*, [2006] OJ, L 376/28.

69 EC, *Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art*, [2001] OJ, L 272/32 [*Directive 2001/84/EC*].

70 EEC, *Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission*, [1993] OJ, L 248/15.

71 EC, *Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs*, [2009] OJ, L 111/16.

72 EC, *Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights*, [2004] OJ, L 157/45, *corrigendum* [2004] OJ, L 195/16.

73 EC, *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases*, [1996] OJ, L 77/20 [*Directive 96/9/EC*].

74 EC, *Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights*, [2006] OJ, L 372/12 (as amended by *Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights)*, [2011] OJ, L 265/1.

75 EC, *Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works*, [2012] OJ, L 299/2.

76 EC, *Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market*, [2014] OJ, L 84.

77 Dinwoodie & Dreyfuss, *supra* note 9 at 3.

78 *Infopaq International A/S v Danske Dagblades Forening* (2009), ECLI:EU:C:2009:465, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2009:465> [*Infopaq International*]. See also article 1(3) of *Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs* [*Council Directive 91/250/EEC*], online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0250:EN:HTML>. See also article 3(1) of *Directive 96/9/EC*, *supra* note 73.

79 *Directive 2001/29/EC*, *supra* note 67.

80 *Infopaq International*, *supra* note 78.

81 See article 1(3) of *Council Directive 91/250/EEC*, *supra* note 78. See also article 3(1) of *Directive 96/9/EC*, *supra* note 73.

82 *Infopaq International*, *supra* note 78.

subsequent cases of *Murphy*[83] and *Painer*[84] confirm the ECJ's determination to enforce the criterion of intellectual creation as the uniform standard of originality for all works across the European Union.

One significant consequence of this is the end of the traditional UK originality test of "skill and labour"; following *Infopaq*, the test of intellectual creation applies in its place. Since intellectual creation appears to be a higher threshold than skill and labour, UK copyright judges have been forced to adjust.[85] The new ECJ-derived standard could mean that certain labour-intensive but uncreative works previously protected in the United Kingdom might no longer be given protection. Nevertheless, although UK courts have, post-*Infopaq*, adopted the new standard in cases such as *Meltwater*[86] and *SAS*,[87] it is still unclear whether any previously covered works are no longer covered by copyright.

Another important element of the *Infopaq* ruling is the ECJ's suggestion that there is virtually no limit on how short a copyright work might be in order for it to be considered sufficiently "original"; all that matters is that the work is considered to be the author's intellectual creation. The only limitation placed by the ECJ is that a single word "considered in isolation" could not be regarded as sufficient to be the intellectual creation of the author.[88] Therefore, while copyright in a single word was ruled out, the door was seemingly left wide open to copyright claims involving very short works of two or more words, or two or more musical notes.[89] This potentially fills gaps in UK national case law, opening up the possibility of a more liberal reading of what might be protected as a copyright work, and thus encouraging authors to make infringement claims over very small pieces of text or music.[90]

Finally, with the *Infopaq* case and the subsequent case of *BSA*,[91] the ECJ has seemingly put an end to the traditional UK "closed list" of works based on certain categories, for example, literary work, musical work, dramatic work and so forth. The UK approach was that anything, such as a TV show format, that fell outside the categories would not be given protection. However, this approach is in doubt since the ECJ's ruling that the sole criterion for copyright should be intellectual creation. This has led to suggestions that unusual creations, such as perfumes and cheeses, may be original enough to receive copyright protection in the United Kingdom.[92]

So, what about taking back control of the above elements of copyright? On the originality threshold, it is unknown at this stage whether the UK courts will revert to their old understanding of the originality test. The ECJ's intellectual creation standard has become part of the common law through its interpretation in cases such as *Meltwater*. So far, this has been unproblematic, but if any problems were to occur in difficult post-Brexit cases, the UK courts could decide to revert to skill and labour. The same is true of the ECJ's view that very small pieces of text or music can be protected, as well as the apparent end of the United Kingdom's closed list of categories of protected works — the United Kingdom could move away from the ECJ's approaches in both respects and return to the traditional UK views. Having said that, there may be reasons why the United Kingdom may wish to keep its originality principles in line with EU law. The terms of the future trading relationship between the European Union and the United Kingdom, along with any provisions on adjudication, will likely determine this.

Exceptions to Copyright Protection

Article 5 of the Information Society Directive mandates an exhaustive list of exceptions, limiting

83 Joined cases C-403/08, C-429/08 *Football Association Premier League and Others v QC Leisure and Others, Karen Murphy v Media Protection Services Ltd*, ECLI:EU:C:2011:631.

84 *Painer v Standard Verlags GmbH*, C-145/10, ECLI:EU:C:2011:798.

85 In this view, some non-creative works traditionally protected under UK copyright may no longer be protected, as they are not able to satisfy the standard of intellectual creation. For commentary on this point, see C Handig, "*Infopaq International A/S v Danske Dagblades Forening* (C-5/08): is the term 'work' of the CDPA 1988 in line with the European Directives?" (2010) 32 Eur IP Rev 53 at 56.

86 *The Newspaper Licensing Agency Limited and others v Meltwater Holding BV and others* [2010] EWHC 3099 (Ch).

87 *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch).

88 *Infopaq International*, *supra* note 78.

89 Luke McDonagh, "Is the Creative Use of Musical Works Without a Licence Acceptable Under Copyright?" (2012) 4 Intl Rev IP & Competition L 401, 410–26.

90 *Ibid*.

91 *Bezpečnostní softwarová asociace v Ministerstvo kultury*, C-393/09, ECLI:EU:C:2010:816.

92 *The IPKat*, "Is there copyright in the taste of a cheese? Sensory copyright finally makes its way to CJEU" (24 May 2017), online: <http://ipkitten.blogspot.co.uk/2017/05/is-there-copyright-in-taste-of-cheese.html>.

the ability of national legislatures to create new limitations to copyright protection. This means that exceptions that are not on the list cannot be brought into the law of an EU member state (and neither can a US-style broad "fair use" exception).[93] Post-Brexit, the United Kingdom could choose to legislate to break away from this closed set and instead look to a broad US-style fair use approach.[94] The United Kingdom could also choose to bring back its narrow private copying exception, which was struck down in a 2015 judicial review action at the English High Court as being incompatible with EU law, as it was compensation-free, and rights holders argued they could have been negatively affected.[95] Although these are possible options, the UK government has, thus far, stressed the need for continuity of the law. New legislation on copyright may be some way off.

Even if the UK legislature does not bring in new legislation and instead decides to keep a closed list of exceptions, the way these exceptions are interpreted by the national courts will be important. One exception that is permitted by the Information Society Directive is parody, which has been a part of UK copyright law since 2014.[96] Post-Brexit, the ECJ's definition of parody under this exception, as expressed in the *Deckmyn* case, will no longer be binding on the United Kingdom.[97] Nonetheless, UK courts will, even after Brexit, be free to continue to apply the EU-derived test for parody as part of the common law, although in time, UK courts may begin to develop the parody definition in new ways. Yet, a grand deviation between the European Union and the United Kingdom on this issue seems unlikely — the *Deckmyn* decision was grounded in the EU Charter on Fundamental Rights, which has parallel provisions in the ECHR, to which the United Kingdom will remain a party.[98] For this reason, any new interpretation of parody taken by the UK courts is unlikely to stray far from *Deckmyn*.

93 *Directive 2001/29/EC*, *supra* note 67, art 5. See also the US fair use criteria in 17 USC § 107.

94 *Ibid.*

95 *BASCA and others v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin); [2015] EWHC 2041 (Admin).

96 *Copyright, Designs and Patents Act 1988* (UK), c 3, s 30A (added by *Copyright and Rights in Performances [Quotation and Parody] Regulations 2014/2356*).

97 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, C-201/13, ECLI:EU:C:2014:2132.

98 Griffiths & McDonagh, *supra* note 8.

Sui Generis Rights

In the context of Brexit, the EU-specific rights are of particular interest, as they exist as a direct result of EU law. This means that once Brexit occurs, they will cease to apply in the United Kingdom (unless some reciprocal EU-UK agreement has been made by that time). One such right is the *sui generis* right for protection of databases.[99] Post-Brexit, this EU right would no longer be binding in the United Kingdom, which could enact national legislation to establish an equivalent UK *sui generis* right. Alternatively, UK courts may develop the United Kingdom's traditional form of protection of databases under copyright.[100]

Another important example of an EU-specific IP right linked to copyright is the artist's resale right.[101] This entitles authors of original artworks to a royalty each time one of their works is resold via an art market professional. Like the database right, the artist's resale right would cease to be binding post-Brexit, and new UK legislation would be required to bring in a UK equivalent right. Although the European Union is on record as stating that such EU IP rights should be given equivalent protection in the United Kingdom, the United Kingdom has yet to respond at the time of writing.[102]

Conclusion

There are cogent reasons to believe that the United Kingdom's post-Brexit taking back control of its IP laws will, in fact, lead to only minimal changes to patent law and copyright law. Regardless of Brexit, due to its WTO membership and the Agreement on Trade-Related Aspects of Intellectual Property Rights, the United Kingdom must abide by the minimum international IP standards in, for example, the Berne Convention and the Paris Convention, as well as fulfilling the requirements of its continuing membership of the EPC.

99 *Directive 96/9/EC*, *supra* note 73.

100 See e.g. *Blair v Alan S Tomkins & Anor* (1971) 21 QB 78; *Griggs Group Ltd and Others v Evans and Others* [2003] EWHC 2914 (Ch).

101 *Directive 2001/84/EC*, *supra* note 69.

102 EC, *Position paper transmitted to EU27 on Intellectual property rights (including geographical indications)*, (2017), online: <https://ec.europa.eu/commission/publications/position-paper-transmitted-eu27-intellectual-property-rights-including-geographical-indications_en>.

Although, post-Brexit, the United Kingdom can, in theory, immediately depart from EU-specific standards on originality and parody of copyright works, or the requirements of biotechnology patenting, in reality, the UK government's proposed "Repeal Bill" aims to ensure continuity with EU law. Even before the Repeal Bill comes into play, it is worth recalling that several directives in the areas of copyright and patents have been implemented in the United Kingdom via national legislation, and the content of those directives has been analyzed through UK case law, embedding it within the common law system.

Moreover, the need for continuity in the IP field between the European Union and the United Kingdom will likely continue for the foreseeable future. The United Kingdom's attempt to participate in the UPC, notwithstanding Brexit, is an indicator of this (although it remains to be seen whether the United Kingdom will be successful in this regard). In addition, the most recent EU position paper on IP aims to establish reciprocity of protection of unitary IP rights within the United Kingdom post-Brexit, showing a determination, at least from the EU side, for convergence of IP protection.[103] Thus, there are certainly opportunities for continued cooperation between the European Union and the United Kingdom on IP issues — what is unknown is which route the UK government will take.

If the United Kingdom opts for a soft Brexit option, either as a transitional or permanent arrangement, such as joining the EEA or the EFTA, EU law will remain binding. The EFTA option even requires accepting the EFTA Court, which follows the ECJ's rulings on EU law. Even if the United Kingdom takes the hard Brexit route, leaving the internal market and Customs Union, and agreeing a mere EU-Canada style FTA with the European Union, EU law will remain highly relevant. Even if, as unlikely as it seems, the UK Intellectual Property Office seeks to align itself from a jurisprudential and administrative standpoint with other non-EU IP offices, such as with Commonwealth countries or the United States, every FTA that the European Union has with countries around the world includes a chapter on IP, requiring the other country under the FTA to comply with some features of EU law.

To conclude, a recurring theme of this paper is that continuity in the IP field is both more likely and more beneficial than radical change. "Take back control" might sound comforting as a slogan, but the practice is likely to mean that patent law and copyright law in the United Kingdom remain much the same.

103 *Ibid*.

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